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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD DAFOE,

Defendant and Appellant.

B173683

(Los Angeles County  
Super. Ct. No. KA060831)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Thomas C. Falls, Judge. Affirmed.

Kathleen M. Redmond, under appointment by the Court of Appeal, for  
Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney  
General, Pamela C. Hamanaka, Senior Assistant Attorney General, Chung L. Mar  
and Alene M. Games, Deputy Attorneys General, for Plaintiff and Respondent.

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As a “loss prevention manager” watched, Richard Dafoe entered a K-Mart store, stuffed a flashlight into his pants, and left the store without paying. Dafoe was apprehended, arrested, and charged with one count of petty theft with a prior within the meaning of Penal Code section 666, with an ancillary allegation that he had served two prior prison terms.<sup>1</sup> Although one jury was unable to reach a verdict and a mistrial was declared, a second jury convicted Dafoe as charged and returned true findings on the allegations. Dafoe was sentenced to state prison for a term of three years. He appeals, contending (with regard to the petty with a prior) that he was entitled to have the jury determine all elements of the priors, including identity. We disagree and affirm the judgment.

## DISCUSSION

The jury determined that the prior convictions occurred, and the trial court determined that Dafoe was in fact the person who suffered those prior convictions. The essence of Dafoe's argument on this appeal is that, post-*Blakely*, he was entitled to have the jury determine the identity issue. (*Blakely v. Washington* (2004) 542 U.S. \_\_\_\_ [124 S.Ct. 2531]; *Apprendi v. New Jersey* (2000) 530 U.S. 466.) We disagree.

To begin with, the prior conviction element of section 666 is a sentencing factor, not an element of the offense. (*People v. Bouzas* (1991) 53 Cal.3d 467,

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<sup>1</sup> All section references are to the Penal Code. As relevant, section 666 provides that “[e]very person who, having been convicted of petty theft . . . and having served a term therefor in any penal institution . . . , is subsequently convicted of petty theft, then the person convicted of that subsequent offense is punishable by imprisonment in the county jail not exceeding one year, or in the state prison.”

475.) If the defendant admits that he has suffered the prior conviction, the jury is never told about it; absent an admission, the "question of whether or not the defendant has suffered the prior conviction" is tried to the jury, but the "question of whether the defendant is the person who has suffered the prior conviction" is tried "by the court without a jury." (§ 1025, subds. (b), (c); *People v. Bouzas*, *supra*, 53 Cal.3d at pp. 471-472; and see *U.S. v. Corona-Sanchez* (9th Cir. 2002) 291 F.3d 1201, 1206.) For this reason, we reject Dafoe's contention that, in enacting section 666, the Legislature created a new crime, not an enhanced sentence for repeat offenders. If, as Dafoe contends, section 666 is in need of "re-characterization" in light of *Blakely et al.*, that re-characterization must be by the Supreme Court, not by us. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 456-457.)

While it is true, as Dafoe contends, that the United States Supreme Court has recently held that any fact which increases the penalty for a crime must be submitted to the jury and proved beyond a reasonable doubt, there is one notable exception to this recent reaffirmation of a defendant's right to a jury trial -- matters related to prior convictions are for the court to decide, not the jury. (*Almendarez-Torres v. United States* (1998) 523 U.S. 224 [no right to a jury trial for sentence increase based on facts of prior conviction]; *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 490 ["Other than the fact of a prior conviction"]; *Blakely v. Washington*, *supra*, 124 S.Ct. at p. 2536 ["Other than the fact of a prior conviction"]; *United States v. Booker* (2005) 543 U.S. \_\_\_\_ [125 S.Ct. 738] ["Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum" must be admitted by the defendant or proved to a jury beyond a reasonable doubt]; *People v. Thomas* (2001) 91 Cal.App.4th 212,

221-222 [no right to jury trial on matters involving the broadly framed issue of recidivism].)

Dafoe was not deprived of his right to a jury trial.

**DISPOSITION**

The judgment is affirmed.

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VOGEL, J.

We concur:

SPENCER, P.J.

MALLANO, J.